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No. 31

In the Supreme Court of the United States

OCTOBER TERM, 1932

J. H. GWINN, BENEFICIARY OF THE ESTATE OF M. A. GWINN, DECEASED, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 13–18) is reported in 20 B. T. A. 1052. The opinion of the Circuit Court of Appeals (R. 32–39) is reported in 54 F. (2d) 728.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 5, 1932. (R. 40.) A petition for rehearing was denied on February 23, 1932. (R. 41.) A petition for a writ of certiorari was filed March 29, 1932, and was granted May 16, 1932. (R. 45.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in computing the Federal estate tax of a decedent who died October 5, 1924 (which tax was consequently governed by Section 302 of the Revenue Act of 1924), one-half of the value of certain property held by the decedent and the petitioner as joint tenants under a joint tenancy created in June, 1915, may constitutionally be included in the gross estate.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 29–40.

STATEMENT

The Board of Tax Appeals found the facts as stipulated by the parties. (R. 11–13.) They may be summarized as follows:

The petitioner is the beneficiary of the estate of M. A. Gwinn and is in actual or constructive possession of the property of the decedent, who died October 5, 1924. (R. 11.)

In June, 1915, the decedent and the petitioner, while residing in California, acquired certain property as joint tenants, with the right of survivorship and not as tenants in common, and the decedent and the petitioner contributed equal amounts of property to the estate in joint tenancy so created by them. (R. 12.)

In computing the value of the gross estate of the decedent, the respondent determined the value

of all of the property held as joint tenants by the decedent and the petitioner and then included in the gross estate of the decedent half of the value of the property so held. (R. 11.) No effort was made to include anything other than the decedent's half of the total estate held in joint tenancy. (R. 11–12.)

It is agreed between the parties that if the Commissioner was not justified in including half of the value of the property so held as joint tenants, there has been an overpayment of estate tax in the amount of $2,172.16, and that if half of the value of the property held as joint tenants is properly subject to the estate tax, there is a deficiency in the amount of $719.61.

Upon these facts the Board of Tax Appeals held that half of the value of the property held in joint tenancy by the decedent and the petitioner must be included in the decedent's gross estate for Federal estate tax purposes, and entered its order that there is a deficiency in Federal estate tax in the sum of $719.61. The Circuit Court of Appeals for the Ninth Circuit affirmed the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

I

Section 302 (e) of the Revenue Act of 1924 provides that there shall be included in the gross estate of a decedent the value "of the interest therein held as joint tenants by the decedent and any other

person." Section 302 (h) makes this provision applicable to all joint tenancies, whether they are created "before or after the enactment of this Act." The sole question involved in this case is whether this clearly expressed intention of Congress violates the "due process" clause of the Fifth Amendment.

II

The petitioner devotes a large part of his brief to the contention that under the law of California no change occurs in the title of a joint tenant on the death of his cotenant. This argument is based on the fictions of the local law announced in *Estate of Gurnsey,* 177 Cal. 211.

In *Tyler* v. *United States,* 281 U. S. 497, this Court considered exactly the same contention, made with respect to a tenancy by the entirety, and expressly rejected it.

III

The property in question was held by the decedent and the petitioner as joint tenants under a tenancy which was created in 1915. Although survivorship is a necessary element of a joint estate, it is familiar law that a joint tenancy may be severed in any one of several ways. A severance terminates a joint estate, and with the termination the right of survivorship ceases. California decisions and statutes show that a joint tenancy in that State may be severed (1) by a conveyance of all or part of the interest of a joint tenant, or (2) through proceedings brought for the partition of the inter-

est of a tenant, or (3) by the involuntary alienation of the interest of one tenant through bankruptcy proceedings or on execution.

Thus it is plain that under the law of California one joint tenant has the power at any time during his life to sever the joint tenancy and thus to destroy the right of survivorship. And it is likewise plain, under numerous decisions of this Court, that the cessation of this power, which was an event which occurred after the enactment of the Revenue Act of 1924, was a proper occasion for the imposition of an estate tax. *Saltonstall* v. *Saltonstall*, 276 U. S. 260; *Chase National Bank* v. *United States*, 278 U. S. 327; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339.

From the time of the creation of the joint tenancy until the time of the death of the decedent in 1924, the half of the property which it is now sought to tax was entirely in the decedent's control, and he might at any time have transferred it or otherwise have severed the joint tenancy, thus terminating the right of survivorship, without which the present petitioner would not have acquired the interest. The existence of this power in the decedent made the transfer to the petitioner incomplete until the decedent's death with respect to the half of the property now in question. That the termination at the decendent's death of the right to exercise this power is an appropriate subject of the estate tax is clearly established by the decisions of this Court just cited.

IV

The decedent's death brought about the shifting of the economic benefits of property, and this event, having taken place after the enactment of the taxing statute, is properly the subject of the estate tax. In *Tyler* v. *United States,* 281 U. S. 497, this Court upheld the constitutionality of an estate tax laid on property held by the decedent as a tenant by the entirety. The grounds on which the decision in this case is based make it clear that the application of the taxing statute to a joint tenancy created before September 8, 1916, is not a retroactive application and that it is valid under the Constitution. In its opinion in the *Tyler case,* the Court stated that the death of a tenant by the entirety was the "generating" source resulting in the "bringing into being or the enlargement of property rights," and that if Congress chose to place a tax upon such a result there was nothing in the Constitution which prevented it. See also *Klein* v. *United States,* 283 U. S. 231. The ripening and completion of the economic benefits to the survivor does not occur until the death of the decedent. Upon the happening of that event the tax is imposed and no question of retroactivity is involved.

The decision in *Knox* v. *McElligott,* 258 U. S. 546, is not inconsistent with the respondent's position in the instant case, for in that case one-half of the jointly owned property was taxed, and there is no effort in the present case to tax more than one-half of the value of the property held jointly by the

decedent and the petitioner. Furthermore, *Knox* v. *McElligott* involved only a question of construction, which is not present in the instant case, for Section 302 (h) of the Revenue Act of 1924 (*infra*, p. 32) expressly provides that Section 302 (e), relating to joint tenancies, shall apply to tenancies whether made or created "before or after the enactment of this Act."

ARGUMENT

I

THE STATUTE REQUIRES THE INCLUSION IN THE DECEDENT'S GROSS ESTATE OF THE VALUE OF HIS INTEREST IN THE JOINT TENANCY

Section 302 of the Revenue Act of 1924 (*infra*, pp. 31–32), which was in effect at the time of the decedent's death, provides that the value of the gross estate of a decedent shall include—

> the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, * * * except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: * * *

By Section 302 (h) this provision is specifically made applicable to all joint tenancies whether they

are created "before or after the enactment of this Act."

The petitioner contends (Br. 55–61) that the word "before" used in Section 302 (h) should be interpreted or construed to mean only that period before June 2, 1924, which is after September 8, 1916. But the words "before or after" are all-inclusive and admit of no limitation or qualification.[1] This Court has already decided the question; in *Nichols* v. *Coolidge,* 274 U. S. 531, the words "whether such transfer or trust is made or created before or after the passage of this Act," used in Section 402 (c) of the Revenue Act of 1918, were held to make the statute applicable to a transfer made in 1907. The petitioner states (Br. 61) that *Phillips* v. *Dime Trust & Safe Deposit Co.,* 284 U. S. 160, supports his contention "by implication." The *Phillips case* involved no such question and made no such construction by implication or otherwise.

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[1] The petitioner refers to Treasury Decision 4248 (*infra*, p. 37), which was in effect from November 23, 1928, to July 3, 1930. This regulation made the statute applicable only to joint ownerships "created subsequent to September 8, 1916." But this qualification of the language of the statute was not based upon a construction of its provisions; it was the Commissioner's expression of his view at that time that the statute could not constitutionally be applied to joint tenancies created before that date. After this Court's decision in *Tyler* v. *United States*, 281 U. S. 497, the regulation was amended so as to include all joint tenancies.

The sole question involved in this case, therefore, is whether this clearly expressed intention of Congress violates the "due process" clause of the Fifth Amendment.

II

THIS COURT HAS ALREADY REJECTED THE PETITIONER'S CONTENTIONS BASED ON THE FICTIONS OF THE LOCAL LAW

The petitioner devotes a large part of his brief to the contention that the property in question can not be taxed because (Br. 9) under the law of California "the title to the joint property does not pass to and vest in the survivor, upon the death of his cotenant, but * * * each is seized of the whole estate from the first, and no change occurs in his title on the death of his cotenant." This argument is based on the fictions of the local law announced in *Estate of Gurnsey,* 177 Cal. 211, and similar cases.

The basis for this argument, in the language of the court below (R. 34), "has been completely overturned" by decisions of this Court. In *Tyler* v. *United States,* 281 U. S. 497, this Court considered exactly the same contention, made with respect to a tenancy by the entirety, and expressly rejected it. In its opinion this Court said (pp. 501, 503):

> The decisions of the courts of Maryland and Pennsylvania follow the common law and are in accord in respect of the character and incidents of tenancy by the entirety. In legal contemplation the tenants constitute a

> unit; neither can dispose of any part of the estate without the consent of the other; and the whole continues in the survivor. In Maryland, such a tenancy may exist in personal property as well as in real estate. These decisions establish a state rule of property, by which, of course, this court is bound. *Warburton* v. *White,* 176 U. S. 484, 496.
>
> * * * * *
>
> According to the amiable fiction of the common law, adhered to in Pennsylvania and Maryland, husband and wife are but one person, and the point made is, that by the death of one party to this unit no interest in property held by them as tenants by the entirety passes to the other. This view, when applied to a taxing act, seems quite unsubstantial. The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death, rather than by a consideration of the artificial rules which delimit the title, rights and powers of tenants by the entirety at common law. * * *

The decision in the *Tyler case* thus makes it plain that there is no merit in the petitioner's oft-repeated contention that this Court is bound by the fictions of local law announced in *Estate of Gurnsey,* 177 Cal. 211, *supra.*

III

DURING THE LIFETIME OF THE DECEDENT IT WAS WITHIN HIS POWER TO SEVER THE JOINT TENANCY AND THUS TO DESTROY THE RIGHT OF SURVIVORSHIP; THE TERMINATION OF THIS POWER ON THE DECEDENT'S DEATH IS THE PROPER SUBJECT OF THE ESTATE TAX

The property in question was held by the decedent and the petitioner as joint tenants, under a tenancy which was created in 1915. (R. 12.) Section 683 of the California Civil Code, as it was in effect in 1915 and until after the death of the decedent, provided that—

> A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or one granted or devised to executors or trustees as joint tenants.

One of the incidents of a joint tenancy is the right of survivorship. *Greer* v. *Blanchar,* 40 Cal. 194.

Although survivorship is a necessary element of a joint estate, it is familiar law that a joint tenancy may be severed in any one of several ways. A severance terminates the joint estate, and with the termination the right of survivorship ceases. This is established by the decisions of the California courts and by California statutes, as well as at common law.

At least three methods of effecting the severance of a joint tenancy are clearly illustrated by California decisions or statutes: (1) In *Green* v. *Skin-*

ner, 185 Cal. 435, 438, the Supreme Court of California declared:

> It is the law that a joint tenancy may be severed and ended by a conveyance by one of the tenants of his share.

(2) Section 752 of the California Code of Civil Procedure provides that any joint tenant may bring an action for the partition of his interests. Partition, of course, destroys the right of survivorship. And (3), in *Hilborn* v. *Soale,* 44 Cal. App. 115, it was held that an involuntary alienation of the interest of one tenant severed the tenancy and destroyed the right of survivorship. The court said (p. 117):

> The execution sale of the interest of Wilson A. Soale to the plaintiff here severed the joint tenancy, and left plaintiff and defendant Carl B. Soale tenants in common, * * *.

It is thus plain that under the law of California one joint tenant has the power at any time during his life to sever the joint tenancy and thus to destroy the right of survivorship.[2] And it is like-

[2] In *Estate of Gurnsey,* 177 Cal. 211, 215, the Supreme Court of California declared: "The joint tenancy referred to in the Civil Code (sec. 683), and here involved, is the estate known as such at common law."

Common-law authorities establish that there are at least five ways in which a joint tenancy may be ~~severed~~ severed: (1) By a conveyance by one of the joint tenants of all or a part of his interest; (2) by mutual agreement between the cotenants; (3) by a course of dealing which intimates "that the

wise plain under numerous decisions of this Court that the cessation of this power, which was an event which occurred after the enactment of the Revenue Act of 1924, was a proper occasion for the imposition of an estate tax.

No effort has been made in the present case to tax any portion of the property except the one-half interest held by the decedent in the joint tenancy. Until the decedent's death this interest was at all times subject to the decedent's power to sever the joint tenancy. This power was held by the decedent entirely independently of any action on the part of the petitioner or anyone else.[3] It was within the decedent's power voluntarily and at any time to sever the joint tenancy by conveyance of either all or a part of his interest to a third person or by instituting partition proceedings. It was not until the decedent died without exercising this power that the petitioner had any certainty of acquiring the other half of the joint property, and it is only this half of the property upon which the tax is laid. The parallel between the situation thus

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interests of all were mutually treated as constituting a tenancy in common" (*Williams* v. *Hensman*, 1 Johns. & H. 546, 557); (4) by partition proceedings brought by one or more of the joint tenants; and (5) by involuntary alienation of the interest of one of the joint tenants, through bankruptcy or on execution. See 2 Blackstone, Commentaries 185–186; Freeman, Cotenancy & Partition (2d ed.), Secs. 29–33; 1 Tiffany, Real Property (2d ed.), 637–640.

[3] The petitioner's statement (Br. 50) that in order to "sever the joint tenancy he must secure the consent of his cotenant" is without support either in law or fact.

involved in this case and that presented where a power of appointment or a power of revocation ceases on death is almost exact. In both of the latter situations this Court has held that an estate tax may validly be levied, although the original transfer of the property subject to the power of appointment or the power of revocation was made many years before the enactment of any estate tax law.

In *Saltonstall* v. *Saltonstall,* 276 U. S. 260, it appeared that on various dates between 1905 and 1907, before the passage of any estate or succession tax law, property was transferred on trust with the provision that on the death of the settlor it should be paid to the plaintiffs. The trust instrument provided that its terms might be changed and the trust terminated in whole or in part by the settlor with the concurrence of the one trustee. After the creation of the trusts but before the death of the settlor, the legislature of Massachusetts enacted a statute taxing "the transfer of property passing to anyone on the exercise of a power of appointment *or the failure to exercise it* * * *." (276 U. S. 269.) The constitutionality of this statute was attacked on the ground that it deprived the plaintiffs of property without due process of law because it taxed them on an interest they had already received before the enactment of the taxing Acts. It was contended that the plaintiffs had vested interests or remainders subject only to being divested by the exercise of the reserved power, which never happened, and that as their remainders vested before

the enactment of the taxing statute they could not constitutionally be made subject to the tax. This Court held that the tax could constitutionally be imposed, saying (p. 271):

> And so the property passing to the beneficiaries here was acquired only because of default in the exercise of the power during the donor's life and thus was on his death subject to the state's power to tax as an inheritance.

A similar question was considered by this Court in *Chase National Bank* v. *United States,* 278 U. S. 327. It was there held that the proceeds of insurance policies on the decedent's life, paid for by the decedent and taken out prior to the passage of the applicable Act but after 1916, might constitutionally be included in the gross estate in determining the Federal estate tax when the insured reserved the right to change the beneficiary. This Court observed that (p. 334)—

> until the moment of death the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them.

The cessation at death of this power was held to be a proper ground for including the value of the property in the measure of the estate tax. This Court said (p. 338):

> Termination of the power of control at the time of death inures to the benefit of

> him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, * * *. And the non-exercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death, *Bullen* v. *Wisconsin,* 240 U. S. 625; * * *.

On the same day on which the decision in *Chase National Bank* v. *United States, supra,* was announced, this Court decided *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339. In that case it appeared that the decedent had created two trusts, among others, one in 1903 and one in 1910. In these two trusts the income was reserved to the settlor for life, and on his death the income was to be paid to a designated person with remainders over. By the terms of each of the two trusts there was reserved to the settlor alone a power of revocation of the trust. The decedent died in 1922. It was held that on his death the value of the property comprising these two trusts might constitutionally be included in the measure of the estate tax, although the trusts had originally been created long before the passage of any Federal estate tax law. This Court said (p. 345):

> As to the two trusts, it is argued that since they were created long before the passage of any statute imposing an estate tax the taxing statute if applied to them is unconstitutional and void, because retroactive,

within the ruling of *Nichols* v. *Coolidge,* 274 U. S. 531. In that case it was held that the provisions of the similar Sec. 402 of the 1918 Act, 40 Stat. 1097, making it applicable to trusts created before the passage of the act was in conflict with the Fifth Amendment of the federal Constitution and void, as respects transfers completed before any such statute was enacted. But in *Chase National Bank* v. *United States,* decided this day, *ante,* p. 327, the decision is rested on the ground, earlier suggested with respect to the Fourteenth Amendment in *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 271, that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death. Hence Sec. 402, as applied to the present transfers, is not retroactive, since his death followed the passage of the statute. For that reason, stated more at length in our opinion in *Chase National Bank* v. *United States, supra,* we hold that the tax was rightly imposed on the transfers of the corpus of the two trusts and as to them the judgment of the court of appeals should be reversed.

From these cases it is clear that property which remains subject to the control of a person during his lifetime, and passes to another at his death only because he has not exercised a power which he might freely have exercised at any time during his life, may constitutionally be made subject to the estate tax in effect at the time of that person's death, regardless of when the estate was originally

created. In the present case it is true that the joint tenancy was created in 1915. But from the time of its creation until the time of the death of the decedent in 1924 the half of the property which it is now sought to tax was entirely in the decedent's control, and he might at any time have transferred it, or otherwise have severed the joint tenancy, thus terminating the right of survivorship, without which the present petitioner would not have acquired the interest. The existence of this power in the decedent made the transfer to the petitioner incomplete until the decedent's death with respect to the half of the property now in question. That the termination at the decedent's death of the right to exercise this power is the proper subject of the estate tax is clearly established by the decisions of this Court in *Saltonstall* v. *Saltonstall, Chase National Bank* v. *United States,* and *Reinecke* v. *Northern Trust Co., supra.*

IV

THE DECEDENT'S DEATH BROUGHT ABOUT THE SHIFTING OF THE ECONOMIC BENEFITS OF PROPERTY, AND THIS EVENT, HAVING TAKEN PLACE AFTER THE ENACTMENT OF THE TAXING STATUTE, IS PROPERLY THE SUBJECT OF THE ESTATE TAX

The decedent's death in the present case occurred in 1924, after the enactment of the Revenue Act of 1924. This event was the "generating source" of enlarged property rights in the petitioner; and we submit that it was thus the proper subject of an estate tax for this reason, as well as for the reason

advanced in Point III of this brief, namely, that until the death of the decedent it remained wholly within his power to determine whether the petitioner would or would not acquire the interests to which he has in fact succeeded.

In *Nichols* v. *Coolidge,* 274 U. S. 531, this Court enunciated the rule that Congress may not constitutionally exact an estate tax on property which was finally transferred before the enactment of the taxing statute. Similar principles were later applied in *Untermyer* v. *Anderson,* 276 U. S. 440, and in *Coolidge* v. *Long,* 282 U. S. 582, in both of which it was held that taxing statutes violated a "due process" clause of the Constitution.

But in the present case the event which is taxed is the "shifting of the economic benefits of property," which takes place on the decedent's death, after the enactment of the taxing statute. In *Tyler* v. *United States,* 281 U. S. 497, this Court upheld the constitutionality of an estate tax laid on property held by the decedent as a tenant by the entirety. In that case the tenancy was created after the passage of the applicable taxing statute, so that the actual decision is not necessarily controlling here. But we submit that the grounds on which the decision in the *Tyler case* is based make it clear that the application of the taxing statute to a joint tenancy created before September 8, 1916, is not a retroactive application and that it is valid under the Constitution.

In its opinion in the *Tyler case* this Court stated that the death of a tenant by the entirety was the "generating source" resulting in "the bringing into being or the enlargement of property rights" and that if Congress chose to place a tax upon such a result there was nothing in the Constitution which prevented. The Court then said (pp. 503–504):

> The question here, then, is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.
>
> * * * * *
>
> Taxation, as it many times has been said, is eminently practical, and a practical mind, considering results, would have some difficulty in accepting the conclusion that the death of one of the tenants in each of these cases did not have the effect of passing to the survivor substantial rights, in respect of the property, theretofore never enjoyed by such survivor. Before the death of the husband (to take the *Tyler case,* No. 428) the wife had the right to possess and use the whole property, but so, also, had her husband; she could not dispose of the property

> except with her husband's concurrence; her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the "generating source" of important and definite accessions to the property rights of the other.

These extracts from the opinion in the *Tyler case* make it clear that death, the event which is the occasion for the imposition of the tax, is the generating source of the enlargement of property rights in the survivor. This is an event which takes place after the passage of the taxing statute regardless of when the tenancy was created. In the present case the decedent's death was the event which made the shifting of the full benefits of ownership to the petitioner complete and effective and secured to him the sole possession and enjoyment of the property unburdened by the decedent's rights. Until his death the decedent retained a dominion over the property equal in all respects to that of the petitioner. Under the decision in the *Tyler case* this ripening of property rights is a

proper subject for the imposition of a tax. See also *Phillips* v. *Dime Trust Co.*, 284 U. S. 160.[4]

A similar question was considered in *Klein* v. *United States*, 283 U. S. 231. There it appeared that prior to the passage of the applicable revenue law, but after 1916, a husband had conveyed a life estate to his wife with the provision that she should take the remainder in case he should die before she should. It was held that on the death of the husband the value of the remainder might constitutionally be included in the measure of the gross estate. In reaching this result this Court said (p. 234):

> It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed. Compare *Tyler* v. *United States*, 281 U. S. 497.

See also *Saltonstall* v. *Saltonstall*, 276 U. S. 260, *Chase National Bank* v. *United States*, 278 U. S. 327, and *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, which are discussed in Point III of this brief.

The principles announced by this Court in the decisions just referred to have been applied not

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[4] The petitioner seems to think his position finds support in *Phillips* v. *Dime Trust Co.*, *supra*. See his brief, pp. 34, 55, 67. But a reading of that decision makes it plain that the present question was expressly left undecided. The reasoning of the case lends direct support to our views.

only by the court below in the present case but also by several other of the lower Federal courts in cases presenting similar questions. Thus in *Grandin* v. *Heiner,* 56 F. (2d) 1082, the Circuit Court of Appeals for the Third Circuit held that the proceeds of insurance policies were subject to the Federal estate tax when the decedent retained the power to change the beneficiary, although the policies were taken out many years prior to the enactment of the Revenue Act of 1916. This Court denied a petition for a writ of certiorari, 286 U. S. 561. In *Lee* v. *Commissioner,* 57 F. (2d) 399, the Court of Appeals of the District of Columbia held that property passing under a general power of appointment was subject to the Federal estate tax although the power was created in 1891. This Court denied certiorari, 286 U. S. 563. The same result was reached by the Circuit Court of Appeals for the First Circuit in *Stratton* v. *United States,* 50 F. (2d) 48, certiorari denied, 284 U. S. 651, where the powers in question were all created prior to September 8, 1916. And in *Third National Bank & Trust Co.* v. *White,* 45 F. (2d) 911, affirmed without opinion, 58 F. (2d) 1085 (C. C. A. 1st), certiorari granted October 17, 1932 (No. 202, October Term, 1932), it was held that property held by a decedent as a tenant by the entirety may be made subject to the estate tax although the tenancy was created before September 8, 1916. The Board of Tax Appeals has uniformly reached the same result since the deci-

sion of this Court in the *Tyler case.*[5] See also *Emery* v. *Commissioner,* 21 B. T. A. 1038; *Griswold* v. *Commissioner,* 23 B. T. A. 635.

It would seem to follow from these decisions that the date of the creation of the tenancy is immaterial. The ripening and completion of the economic benefits to the survivor does not occur until the death of the decedent. Upon the happening of that event the tax is imposed and no question of retroactivity is involved.

In *Nichols* v. *Coolidge,* 274 U. S. 531, ~~in *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, with respect to the "five trusts,"~~ and in *Coolidge* v. *Long,* 282 U. S. 582, this Court held that when a trust was created before the enactment of any taxing statute and no power of revocation was reserved, the mere coming into possession of a vested remainder could not constitutionally be made the subject of an estate or succession tax. But it is plain from the language used by the Court in its opinion in *Coolidge* v. *Long* that these decisions are applicable only to the situation where death brings about no more than the coming into possession of an estate which had

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[5] *Slocum* v. *Commissioner,* 21 B. T. A. 169; *Commerce Union Trust Co.* v. *Commissioner,* 21 B. T. A. 174; *Putnam* v. *Commissioner,* 21 B. T. A. 205; *Garrison* v. *Commissioner,* 21 B. T. A. 904; *Mercantile-Commerce National Bank* v. *Commissioner,* 21 B. T. A. 1347; *Robinson* v. *Commissioner,* 21 B. T. A. 1373; *Morton* v. *Commissioner,* 23 B. T. A. 236; *Bowditch* v. *Commissioner,* 23 B. T. A. 1266; *Levy* v. *Commissioner,* 25 B. T. A. 1174; *Dennis* v. *Commissioner,* B. T. A., decided October 6, 1932.

already irrevocably vested in the remainderman. Thus, in *Coolidge* v. *Long,* the Court said (pp. 597, 599):

> Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right of the remaindermen. * * *
>
> No Act of Congress has been held by this court to impose a tax upon possession and enjoyment, the right to which had fully vested prior to the enactment.

But in the present case the result of the death of the decedent was not simply the coming into possession by the petitioner of an estate which he already owned irrevocably. Until the death of the decedent the petitioner had no interest in substance in the decedent's share of the joint tenancy, except the possibility of survivorship, which it was within the decedent's power at any time to terminate. Thus, it is clear that death in the present case was not merely the occasion for the coming into possession of an already vested remainder, but was the "generating source" of new rights, and was consequently the proper subject of an estate tax regardless of the time when the tenancy was created.

In *Knox* v. *McElligott,* 258 U. S. 546, it appeared that the decedent and another became joint tenants of certain property in 1912. The decedent died in 1917, and his executors included in the return of the Federal estate tax on his estate the value of one-half of the jointly owned property. Thereafter the Commissioner of Internal Revenue added to

the estate the one-half of the value which had not been included in the original return. This Court held that the one-half of the value of the property which had not been included in the original estate tax return was not subject to the estate tax.

It is plain that there is nothing in *Knox* v. *McElligott* which is inconsistent with the respondent's position in the instant case. For in that case one-half of the jointly owned property was taxed, and there is no effort in the present case to tax more than one-half of the value of the property held jointly by the decedent and the petitioner. (R. 11–12.) Furthermore, *Knox* v. *McElligott* involved only a question of construction, which is not present in the instant case, for Section 302 (h) of the Revenue Act of 1924 (*infra,* p. 32) expressly provides that Section 302 (e), relating to joint tenancies, shall apply to tenancies whether made or created "before or after the enactment of this Act." There was no such provision in Section 202 of the Revenue Act of 1916 (*infra,* p. 29) which was before the Court in *Knox* v. *McElligott.*[6] For similar reasons the decisions in *Carter* v. *English,* 15 F. (2d) 6 (C. C. A. 9th), and *Lynch* v. *Congdon,* 1 F.

[6] A case which is in all respects similar to *Knox* v. *McElligott* is *Walker* v. *Grogan*, 283 Fed. 530 (E. D. Mich.), affirmed, *Grogan* v. *Walker*, 300 Fed. 1004 (C. C. A. 6th), certiorari denied, 266 U. S. 603. Similarly, *Doe* v. *Commissioner*, 18 B. T. A. 427, and *Mastick* v. *Commissioner*, 18 B. T. A. 428, arose under the Revenue Act of 1918, which contained no provision corresponding to Section 302 (h) of the Revenue Act of 1924.

(2d) 133 (C. C. A. 8th), are not in point. They arose under the Revenue Act of 1916, which contained no provision making the tax applicable to joint tenancies created before September 8, 1916. Furthermore, *Carter* v. *English, supra,* was based on certain theoretical conceptions of State law concerning the nature of joint tenancy, derived from *Estate of Gurnsey,* 177 Cal. 211. As we have pointed out in Point II of this brief above, such an argument has already been rejected by this Court.

The regulations of the Treasury Department have not been uniform as to the question now under consideration. At first the Department applied the statute to all tenancies whenever created. Regulations 68, issued under the Revenue Act of 1924, merely copied Section 302 (h) of that Act (*infra,* pp. 33–36). In 1928 Treasury Decision 4248 (*infra,* p. 37) was promulgated, providing that the taxing statute did not apply to joint tenancies created before September 8, 1916, and a similar provision was included in Article 22 of Regulations 70 (1929 ed.), which was promulgated March 23, 1929, under the Revenue Act of 1926, as amended by the Revenue Act of 1928 (*infra,* pp. 36–37). But, on July 3, 1930, after the decision of this Court in the *Tyler case,* Treasury Decisions 4294 and 4295 (*infra,* pp. 37–38) were promulgated. These Decisions revoked the earlier ruling and expressly provided that all joint tenancies were subject to the

tax regardless of the time when they were created. These regulations are still in effect.

The question here involved has been considered by several State courts, which have held that on the death of a joint tenant a State inheritance tax statute might constitutionally be applied to tax half the value of property held in joint tenancy, even though the estate was created before the passage of the taxing Act. *Matter of McKelway,* 221 N. Y. 15; *Tax Commission* v. *Hutchison,* 120 Ohio St. 361; *Will of Ray,* 188 Wis. 180.

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectfully submitted.

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OCTOBER, 1932.

APPENDIX

STATUTES

The Revenue Act of 1916 (Act of September 8, 1916, c. 463, 39 Stat. 756, 777–778) in Title II (Estate Tax) provided in part:

> SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:
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> * * * * *
>
> (c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.
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> * * * * *

Section 300 of the Act of March 3, 1917, c. 159, 39 Stat. 1000, 1002, and Section 900 of the Revenue Act of 1917 (Act of October 3, 1917, c. 63, 40 Stat. 300, 324), increased the rates of the estate tax, but made no other changes in this tax.

The Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057, 1097) in Title IV (Estate Tax) contained the same provision except that it was renumbered to be Section 402 (d).

The Revenue Act of 1921 (Act of November 23, 1921, c. 136, 42 Stat. 227, 278) in Title IV (Estate Tax) provided in part:

> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
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> * * * * *
>
> (d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof:
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> * * * * *

The Revenue Act of 1924 (Act of June 2, 1924, c. 234, 43 Stat. 253, 304) in Title III (Estate Tax) provided in part:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (e) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent

of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

* * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 1094.)

In the Revenue Act of 1926 (Act of February 26, 1926, c. 27, 44 Stat. 9, 70–71; U. S. C. App., Title 26, Sec. 1094) in Title III (Estate Tax), Section 302 (e) is the same as Section 302 (e) in the Revenue Act of 1924, set out above, except that in the two places in which it appears the phrase "a fair consideration" is replaced by the phrase "an adequate and full consideration"; and Section 302 (h) is the same in the two Acts, except that in the Revenue Act of 1926 the words "Except as otherwise specifically provided therein" are inserted at the beginning of the subsection.

No changes were made in this provision by the Revenue Act of 1928 (Act of May 29, 1928, c. 852, 45 Stat. 791) or by the Revenue Act of 1932 (Act of June 6, 1932, Public No. 154).

Congressional Committee Report

REVENUE ACT OF 1924

In the Report of the Committee on Finance, Senate Report No. 398, 68th Congress, 1st Session, it was said (p. 35):

SEC. 302 (e): The provisions of the House bill and the existing law have been reworded to secure greater clarity.

SEC. 302 (h): This subdivision provides that the property interests which are included in the gross estate for purposes of the estate tax are those enumerated in this section, whether such interests were created or arose or were relinquished before or after the enactment of this act.

A similar provision is included in subdivision (c) [relating to trusts] of section 402 of the existing act [Revenue Act of 1921]. It has seemed desirable to extend this provision expressly to the other property interests set forth in this section.

In the Conference Report, House Report No. 844, 68th Congress, 1st Session, it was said (p. 25):

> The provision of the House bill with reference to that part of the gross estate made up of property held by the decedent as a joint tenant or as a tenant by the entirety has been reworded for purposes of clarity. * * *

REGULATIONS UNDER THE REVENUE ACT OF 1924 AND SUBSEQUENT ACTS

Regulations 68, promulgated March 26, 1925, under the Revenue Act of 1924, provided in part:

> ART. 22. *Property held jointly or as tenants by the entirety.*—The foregoing provisions of the statute extend to joint ownerships, wherein the right of survivorship exists, and specifically reaches property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a

banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed towards the acquisition of the property so held or deposited, or acquired it by gift, bequest, devise, or inheritance. The statute applies to all classes of property, whether real or personal, where the survivor takes the entire interest therein by right of survivorship, and no interest therein forms a part of the decedent's estate for purposes of administration. It does not include property held by the decedent and any other person or persons as tenants in common.

ART. 23. *Taxable portion.*—The entire value of such property is prima facie a part of the decedent's gross estate, but as it is not the intent of the statute that there should be so included a greater part or proportion thereof than is represented by an outlay of funds, which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner where neither had parted with any consideration in its acquirement, facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

Whether the value of the entire property, or only a part, or none of it, enters into the make-up of the gross estate, depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth, forms no part of the decedent's gross estate. (2)

Where the facts are otherwise the same as in (1), but the decedent paid to such other joint owner a consideration for the interest by him (the decedent) acquired in the property, then such portion of the value of the property, proportionate to the consideration so paid, constitutes a part of the gross estate. (3) Where the property, or a part thereof, or a part of the consideration wherewith it was acquired, had at any time been acquired by the other joint owner from the decedent as a gift, or for less than a fair consideration in money or money's worth, then such portion of the value of the entire property, proportionate to the consideration, if any, which in the first instance was paid from such other joint owner's own funds, forms no part of the gross estate. (4) Where the property was acquired by the decedent and his or her surviving spouse as tenants in the entirety by gift, will, or inheritance, then but one-half of the value of the property becomes a part of the gross estate. (5) Where acquired by the decedent and the other joint owner as joint tenants by gift, will, or inheritance, and their interests are not otherwise specified, or fixed by law, then one-half only of the value of the property is a part of the gross estate; or, where so acquired by the decedent and two or more persons, and the interests of the several joint tenants are not otherwise determinable, then the decedent and the other joint tenants surviving him shall each be deemed the owner of an equal fractional part, and the value of one only of such fractional parts is to be included in the gross estate.

The following are given as illustrative: (a) Where the decedent furnished the entire purchase price, the entire property

should be included in the gross estate; (b) where the decedent furnished a part only of the purchase price, only a corresponding portion of the property should be so included; (c) where the decedent, prior to the acquisition of the property by himself and the other joint owner, gave the latter a sum of money which later constituted such other joint owner's entire contribution to the purchase price of the property, the entire value of the property should be included; (d) where the other joint owner, prior to the acquirement of the property, received from the decedent, for less than a fair consideration in money or money's worth, property which thereafter became, as such, or in a converted form, part of the purchase price of the property, the value of the property to be included is to be reduced proportionately to the consideration furnished by the other joint owner in the original transaction; (e) where the decedent furnished no part of the purchase price, no part of the property should be included; (f) where the decedent and spouse acquired the property by will as tenants by the entirety, one-half of the value of the property should be included.

Articles 22 and 23 of Regulations 70 (1926 ed.), promulgated August 24, 1926, under the Revenue Act of 1926, are the same as Articles 22 and 23 of Regulations 68 set out above.

Articles 22 and 23 of Regulations 70 (1929 ed.), promulgated March 23, 1929, under the Revenue Act of 1926, as amended by the Revenue Act of 1928, are the same as Articles 22 and 23 of Regulations 68 set out above, except that the first sentence of Article 22 of Regulations 70 (1929 ed.) reads as follows:

The foregoing provisions of the statute extend only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916.

Treasury Decision 4248 (VII–2 Cumulative Bulletin 358–359), promulgated November 23, 1928, provides:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 22 of Regulations 68 and 70 is hereby amended by adding thereto the following sentence:

The statute applies only to joint ownerships based on the right of survivorship and created subsequent to September 8, 1916.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved November 23, 1928.

A. W. MELLON,
Secretary of the Treasury.

Treasury Decision 4294 (IX–2 Cumulative Bulletin 425), promulgated July 3, 1930, provides:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

The last sentence of article 22 of Regulations 68, added thereto by Treasury Decision 4248, is amended to read as follows:

The statute extends to joint ownerships wherein the right of survivorship exists, re-

gardless of when such joint ownerships were created.

ROBT. H. LUCAS,
Commissioner of Internal Revenue.

Approved July 3, 1930.

A. W. MELLON,
Secretary of the Treasury.

Treasury Decision 4295 (IX–2 Cumulative Bulletin 426), promulgated July 3, 1930, provides:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 22 of Regulations 70 (1929 Edition) is hereby amended by substituting in lieu of the first sentence thereof the following:

The foregoing provisions of the statute extend to joint ownerships wherein the right of survivorship exists, regardless of when such joint ownerships were created.

ROBT. H. LUCAS,
Commissioner of Internal Revenue.

Approved July 3, 1930:

A. W. MELLON,
Secretary of the Treasury.

REGULATIONS UNDER ACTS PREVIOUS TO THE REVENUE ACT OF 1924

Articles 27 and 28 of Regulations 37 (Revised January, 1921), promulgated January 31, 1921, under the Revenue Act of 1918, and Articles 23 and 24 of Regulations 63, promulgated July 27, 1922, under the Revenue Act of 1921, are the same, so far as the present question is concerned, as Articles 22

and 23 of Regulations 68 set out above, *supra*, pp. 33–34. These Regulations have been twice amended by Treasury Decisions which are set out below.

Treasury Decision 3951 (VI–1 Cumulative Bulletin 314–315), promulgated December 29, 1926, provides:

> TREASURY DEPARTMENT,
> OFFICE OF COMMISSIONER
> OF INTERNAL REVENUE,
> *Washington, D. C.*
>
> *To Collectors of Internal Revenue and Others Concerned:*
>
> Article 27 of Regulations No. 37 (revised January, 1921), and article 23, Regulations No. 63, are hereby amended to read as follows:
>
> "*Property held jointly or as tenants by the entirety.*—The statute provides for the inclusion in the gross estate of interests held jointly by the decedent and any other person or persons and of estates by the entirety. This provision applies only to a joint tenancy, or a tenancy by the entirety, created subsequent to the passage of the Revenue Act in force and effect at the time of the decedent's death. This class of property includes all interests, whether in real or personal property, where the survivor takes the entire property by right of survivorship, and consequently the decedent's interest therein forms no part of his estate for purpose of administration. It does not include interests held as tenants in common where the interest of each tenant passes free from any right of survivorship.
>
> "The following are examples of this class: Real estate held by joint tenants; real estate held by husband and wife (known as an estate by the entirety); money deposited in a

bank or trust company in the joint names of the decedent and another and payable to either or the survivor; and, in general, all securities and other personal property, where the title thereto was vested in the decedent and one or more other persons, subject to the right of survivorship."

These amendments apply only to the estates of decedents who died prior to the effective date of the Revenue Act of 1924.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved December 29, 1926.

A. W. MELLON,
Secretary of the Treasury.

Treasury Decision 4293 (IX–2 Cumulative Bulletin 425), promulgated July 3, 1930, provides:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 27 of Regulations 37 (revised January, 1921), and article 23, Regulations 63, as amended by Treasury Decision 3951, are hereby amended by striking out the following sentence:

"This provision applies only to a joint tenancy, or a tenancy by the entirety, created subsequent to the passage of the Revenue Act in force and effect at the time of the decedent's death."

ROBT. H. LUCAS,
Commissioner of Internal Revenue.

Approved July 3, 1930:

A. W. MELLON,
Secretary of the Treasury.

U. S. GOVERNMENT PRINTING OFFICE: 1932